IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1010 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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KHAIRUNISSA SALIM MOHD QURESHI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 1010 of 2001

MR HR PRAJAPATI for Petitioner No. 1

MR HL JANI ASSTT GOVERNMENT PLEADER for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 24/07/2001

ORAL JUDGEMENT

Heard learned advocate Mr.H.R.Prjapati, appearing on behalf of the petitioner and Mr.H.L.Jani, learned AGP appearing on behalf of the respondents. In the present petition, the order of detention dated 31st December, 2000 is challenged by the petitioner under Article 226 of

the Constitution of India. The order of detention has been passed by the Police Commissioner, Surat City under Section 3[1] of the PASA Act. The grounds of detention are communicated and supplied to the petitioner under Section 9[1] of the PASA Act. The present petitioner has been detained in Sabarmati Central Jail as Class-II detenu. Looking to the grounds of detention, one offence has been registered against the present petitioner in respect of DCB - III Crime Register No.5547 / 2000 under the provisions of Bombay Prohibition Act. The date of registered offence is 8th October, 2000. The petitioner was arrested by the concerned police authority on 9th October, 2000 and thereafter the petitioner was released on 10th October, 2000. The statements of secret witnesses were recorded by the concerned Police Inspector on 12th December, 2000 and verified by the detaining authority on 29th December, 2000. One statement of the secret witness was recorded on 13th December, 2000 and verified on 29th December, 2000 by the detaining authority. That two unregistered offence have been noted by the detaining authority consequent upon recording of the statements of the secret witnesses dated 24th November, 2000 and 2nd December, 2000. The order of detention has bee passed on 31st December, 20000. The detaining authority has claimed privilege under Section 9[2] of the PASA Act. The petitioner has submitted representation dated 31st January, 2001 which is at pg.28 of compilation Annexure-C, in which, second paragraph of the representation, the petitioner has requested to the Deputy Secretary of the Home Department to supply necessary documents in respect of C.R.No.5547 / 2000. The demand which has been made by the petitioner to supply copies of all the statements recorded under Section 161 of the CrPC. The said representation has been received by the respondent - State Government on 1st February, 2001 and the same has been rejected on 5th February, 2001 and accordingly communicated by letter dated 13th February, 2001 to the petitioner. But no answer has been given by the respondents in respect of the demand made by the petitioner in the representation to supply relevant statements recorded by the concerned investigating officer under Section 161 of the CrPC.

#. It is necessary to note that other two co-detenu against whom very same offence has been charged, were also detained under the provisions of the PASA Act by the detaining authority by passing the order of detention on date 31st December, 2000 and the said two co-detenu namely Salim @ Salim Jol Mohd. Qureshi and the other one Salim @ Salim Mohd. Qureshi have also preferred Special Civil Application No.1000/2001 and 959 of 2001

respectively. However, in these three matters, wherein the orders of detention are passed by the detaining authority against the husband and wife and brother-in-law and thus, they all are family membres of one family.

#. Initially, these three petitions have been decided by this Court [Coram : Mr.Justice S.K.Keshote, J.] by order dated 13th February, 2001, whereby all three petitions were allowed while setting aside the order of detention dated 31st December, 2000 passed by the Police Commissioner, Surat City against each of the petitioner of above referred three petitions. However, it is observed that these orders have been passed by this Court on 13th February, 2001 without issuing notice to the State Government and without hearing the State Government. Therefore, the State Government has approached the Hon'ble Division Bench of this Court by way of Letters Patent Appeals and accordingly, preferred three Letters Patent Appeal against each respective petition which are numbered as LPA No.496 / 2001 to 498 / 2001. The Hon'ble Division Bench of this Court consisted of the Hon'ble the Chief Justice Mr.D.M.Dharmadhikari and Mr.Justice K.R.Vyas, J.J., has decided all three letter patent appeals along with other cognate appeals on 28th June, 2001. The Hon'ble Division Bench of this Court has passed the order, wherein relevant observations in concluding paragraph are in para-6, are reproduced hereinbelow :-

"6. For the reasons aforesaid, we cannot approve the procedure adopted by the learned Judge in releasing the detenus by hearing their learned counsel at admission stage without notice of hearing to the detaining authority. Consequently, we set aside the order of the learned Single Judge dated 13th February, 2001 impunged in Letters Patent Appeals. Nos.496, 497 and 498 of 2001 and order dated 25-4-2001 impugned in Letters Patent Appeal No.481 of 2001 and send back the cases to the appropriate learned single Judge for final hearing of the matters at an early date. Reply affidavit is now placed on the record of appeals and, therefore, it is made clear that no further notice now will be required to be issued to the respondents in the main petition. The learned AGP Ms.Manisha Lavkumar waives service. Let all these matters be now taken up by the learned single judge for final hearing in order of dates of detention.

Civil Applications accordingly stand disposed

of."

In pursuance of the order passed by the division bench of this Court, all three petitions are listed before this Court for final hearing since there was no decision on merits given by the Hon'ble Division Bench of this Court. Therefore, each petition is taken up by this Court for final hearing on merits.

#. Learned advocate Mr.H.R.Prajapati has submitted that in the present petition, the detention order has been challenged on various grounds but according to him, two contentions are enough to vitiate the order of detention. He submitted that there was delay in passing the detention order from the date of last registered offence on dated 8th October, 2000. He also submitted that even two unregistered offence dated 24th November, 2000 and 2nd December, 2000 are taken into account, but despite this, the order of detention has been passed on 31st December, 2000 and therefore, there was delay of more than 28 days from the last unregistered offence dated 2nd December, 2000. He also submitted that a specific contention has been raised by the petitioner in ground [u[to the effect that there is delay in passing the order of detention because alleged offence was registered as C.R.No. 5547 / 2000 on date 8th October, 2000, whereas the order of detention is passed on 31st December, 2000, which in fact after a lapse of three months. He also raised contention in the petition that it is duty of the detaining authority to show live link between the alleged incident and the order of detention, the detaining authority has relied upon the statement of two witnesses referring the alleged incident dated 24th November, 2000 and 2nd December, 2000. Thus, delay in passing the detention order creates doubt about genuineness of subjective satisfaction of the detaining authority and therefore, according to hi, the detention order is required to be quashed and set aside by this Court. The second contention which has been raised by the petitioner in ground [l] to the effect that the detaining authority has relied upon the statements of the witnesses and kept identity secret by claiming privilege under Section 9[2] of the PASA Act and the detaining authority has not made any inquiry to verify the genuineness and correctness of the said witnesses and made a false statement in the grounds of detention that he has personally verified the statements of witnesses. The detaining authority must disclose before this Court the materials of his verification of the alleged incidents. In absence of the same, the subjective

satisfaction of the detaining authority of claiming privilege under Section 9[2] of the Act gets vitiated and therefore, subjective satisfaction on such basis cannot be established.

#. Over and above these two main contentions, the third contention which has been raised by the learned advocate Mr.Prajapati that in representation dated 31st January, 2001, which was received by the State Government on 1st February, 2001, wherein in para-2, statement which were recorded by the Investigating Officer under Section 161 of the CrPC were asked by the petitioner to supply the same for making an effective representation. He submitted that representation has been rejected on 5th February, 2001 and same has been communicated to the petitioner on 13th February, 2001 but there was no answer to the demand of supplying the documents to the petitioner. Therefore, he submitted that not to supply requisite documents inspite of the demand, which were considered and relied upon by the detaining authority at the material time of passing the detention order, in that case, the legal right of the petitioner of making an effective representation, would certainly be adversely affected, which ultimately violated Article 22[5] of the Constitution of India.

#. Learned advocate Mr.Prajapati has relied upon following decision of this Court, which are referred as under :

[1] 1997 [1] GLH pg.381
[2] 2000 [2] GLR 1767
[3] 1993 [1] GLR 1659
[4] 1994 [1] GLR 761
[5] 2000 [3] GLR 2696

#. Learned AGP Mr.H.L.Jani, appearing on behalf of the respondents - State has submitted that the detaining authority has filed a detailed reply against the present petitioner in Letters Patent Appeal and reply which has been filed by the detaining authority in LPA may be considered to be a reply in the present petition. He submitted that the contention which has been raised by the present petitioner in ground [i], reply has been given by the detaining authority that after careful scrutinising and examination and considering the material placed before the detaining authority and according the detaining authority, he has personally verified the genuineness and correctness and veracity of the incident narrated in the statements of the confidential witnesses who were called personally to the office of the detaining

authority for verifying the statements made by them and after following all these formalities, the detaining authority has exercised and claimed privilege under Section 9[2] of the Act. It is also stated that the said privilege was exercised in view of the fear expressed by the confidential witnesses regarding danger to their life and property if their names were disclosed to the detenu. Therefore, there is no infraction of any of the Constitutional Provision or guarantees affected to the petitioner detenu. The Detaining authority has passed the detention order against the petitioner to prevent him from continuing his anti social activities of bootlegging and further to prevent him from disturbing the maintenance of public order. Learned AGP Mr.H.L.Jani relying upon the contents of para-18 of the reply submitted that at the time of passing the detention order, whatever materials relied upon and the statements so considered, all have been supplied to the petitioner and the allegation of not supply of relevant statement has been denied by the detaining authority. The representation dated 31st January, 2001 of the petitioner has been replied and a reply thereof has been communicated to the petitioner. Learned AGP Mr.H.L.Jani for the respondent has also relied upon the affidavit-in-reply filed by the detaining authority in the LPA and same has been considered as the affidavit-inreply in the present petition. In light of above submission, Mr.H.L.Jani learned AGP has submitted that the privilege claimed by the detaining authority under Section 9[2] has been rightly claimed and there were compelling circumstances and considering the fear expressed by the secret witnesses, which has been taken into consideration by the detaining authority and therefore, the names and addresses of such witnesses have not been disclosed to the detenu. He also submitted that the documents which have been demanded by the petitioner, were supplied to the petitioner and representation has been rightly rejected by the State Government. He also submitted that looking to the offence committed by the petitioners, there were compelling circumstances and there were other circumstances on the basis of the statements of the secret witnesses which justify the detention order. Therefore, the order of detention has been passed against the petitioner, is legal and valid and the same is not required to be interfered with by this Court.

#. I have considered the submissions made by the learned advocates for the parties. In all three contentions have been raised by the learned advocate Mr.Prajapati on behalf of the petitioner and accordingly, the first

contention which has been raised that inspite of the demand made in the representation dated 31st January, 2001, documents have not been supplied to the present petitioner. That said documents are the statements which came to be recorded by the investigating officer under Section 161 of the CrPC in respect of the offence alleged to have been committed by the present petitioner. While rejecting the representation of the present petitioner on 5th February, 2001 which has been communicated to the petitioner by the Section Officer of the Home Department dated 13th February, 2001, wherein a copy of such order has been forwarded to the Police Commissioner, Surat City who is the detaining authority, with a direction that whatever documents have been asked by the advocate of the petitioner, the same shall be required to be supplied by the detaining authority to the petitioner. This specific note has been made in the communication letter dated 13th February, 2001. Inspite of this clear direction issued by the Home Department to the detaining authority, no such documents have been supplied by the detaining authority to the petitioner. Even no reference has been made in the reply that the statements of the witnesses which have been recorded by the Investigating Officer under Section 161 of CrPC has been supplied to the petitioner. Therefore, fact remains that inspite of the demand of the documents which are referred to and relied upon by the detaining authority while passing the detention order, statements of the witnesses were recorded during the investigation in respect of the offence alleged to have been committed by the petitioner. Looking to the grounds of detention, the detaining authority has considered the offence registered against the present petitioner in Crime Registered vide C.R.III-5547 / 2000, wherein the statements which were recorded by the investigating officer is also considered and relied upon by the detaining authority while passing the detention order so statements of such witnesses which were recorded under Section 161 of CrPC by the Investigating Officer is part and parcel of the grounds of detention which has been taken into account by the detaining authority, therefore, such documents are essential, important and vital and therefore, the demand which has been made by the petitioner to supply the same and not considered the request of the petitioner and no such documents even subsequently supplied to the petitioner, which definitely adversely affected the right of the petitioner for making an effective representation which ultimately violated Article 22[5] of the Constitution Of India. The Apex Court has considered this very aspect in reported in case of 1990 [2] SCC pg.1 para-19 and 20 which are quoted as under :-

"19. The next submission is that of non-supply of the bail The next submission is that of non-supply of the bail application and the bail order. This Court, as was observed in Mangalbhai Motiram Patel v. State of Maharashtra, [1981] 1 SCR 852, has 'forged' certain procedural safeguards for citizens under preventive detention. The Constitutional imperatives in Article 22(5) are two-fold: (a) The detaining authority must, as soon as may be i.e. as soon as practicable, after the detention communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detenu the earliest opportunity of making the representation against the order of detention. The right is to make an effective representation and when some documents are referred to or relied on in the grounds of detention, without copies of such documents, the grounds of detention would not be complete. The detenu has, therefore, the right to be furnished with the grounds of detention along with the documents so referred to or relied on. If there is failure or even delay in furnishing those documents it would amount to denial of the right to make an effective representation. This has been settled by a long line of decisions: Ramachandra A. Kamat v. Union of India, [1980] (2) SCR 1072; Frances Coralie Mullin v. W.C. Kharnbra & Ors., [1980] 2 SCR 1095; Smt. Ichhu Devi Chararia v. Union of India, [1981] SCR 640; Pritam Nath Hoon v. Union of India, [1981] 1 SCR 682; Shri Tushar Thakkar v. Union of India, [1980] 4 SCC 499; Lallubhai Jogibhai Patel v. Union of India, [1981] 2 SCC 427; Kirit Kumar Chaman Lal Kundaliya v. Union of India, [1981] 2 SCC 436 and Smt. Ana Carelina D'Souza v. Union of India, [1981] Suppl. SCC 53.

20. It is immaterial whether the detenu already knew about their contents or not. In Mehrunissa v. State of Maharashtra, [1981] 2 SCC 709, it was held that the fact that the detenu was aware of the contents of the documents not furnished was immaterial and non-furnishing of the copy of the seizure list was held to be fatal. To appreciate this point one has to bear in mind that the detenu is in jail and has no access to his own documents. In Mohd. Zakir v. Delhi Administration, [1982] 3 SCC 2 16 it was

reiterated that it being a Constitutional imperative for the detaining authority to give the documents relied on and referred to in the order of detention pari passue the grounds of detention, those should be furnished at the earliest so that the detenu could make an effective representation immediately instead of waiting for the documents to be supplied with. The question of demanding the documents was wholly irrelevant and the infirmity in that regard was violative of Constitutional safeguards enshrined in Article 22(5)."

Recent decision of this Court in case of KOLI SURESHBHAI VS. DISTRICT MAGISTRATE reported in 2000 [2] 1767, the relevant para-12 are as under :-

"12. Thus, the correct legal position, which emerges from the aforesaid decisions, is as under :-

[i] Failure to furnish copies of the documents to which only a reference or a casual or passing reference was made in the grounds of detention is not an infringement of Article 22[5], fatal to the order of detention.

[ii] While a distinction has to be maintained between a document which has been relied upon by the detaining authority in the grounds of detention and a document which finds a mere reference in the grounds of detention, non supply of the copy of the documents relied upon in the grounds of detention is fatal to continue the detention and in such cases the detenu need not to show that any prejudice is caused to him. Non supply of such a document would amount to denial of right of being communicated the grounds and of making an effective representation against the order.

[iii] When the detenu was already on bail at the time when the detention order was passed, the detaining authority has to necessarily rely upon the bail application and the order granting bail as that would be a vital ground for ordering the detention and in such cases, the copies should also be supplied to the detenu.

[iv] What applies to a document would equally apply to furnishing translated copy of the

document in the language known to and understood by the detenu, should the document be in a different language."

#. The second contention which has been raised by the petitioner that privilege which has been claimed by the detaining authority under Section 9[2] of the Act without examining genuineness of the statements made by the secret witnesses, therefore, subjective satisfaction is not established from the record. It is necessary to note that when any material has been used against the present petitioner, then same is required to be disclosed to the detenu while passing the detention order. But statements of secret witnesses which were recorded wherein names and addresses of such witnesses have not been disclosed to the present petitioner while claiming privilege under Section 9[2] of the PASA Act. Therefore in such circumstances, it is the duty of the detaining authority to consider important aspect of the matter that while claiming privilege under Section 9[2] of the PASA Act, background of the detenu, past history of the detenu, seriousness of the offence and other relevant factors are necessary to take into account before claiming privilege under Section 9[2] of the PASA Act. In the present case, looking to the grounds of detention, privilege which has been claimed by the detaining authority under Section 9[2] of the PASA Act, was merely on the basis of the fear expressed by the secret witnesses and no other material has been taken into account by the detaining authority. Therefore, view taken by the division bench of this Court as well as full bench of this Court so also the learned single judge, of which the relevant observations, are quoted as under :-

In case reported in 1993 [2] GLR 1659, the relevant observations in para-6.

"6. His second contention is that the detaining authority has wrongly exercised the powers under Section 9[2] of PASA Act and by such wrong exercise of powers the detenu, right to make a representation under Article 22[5] of the Constitution has been infringed. He further elaborates his submission by pointing out that the statements of the witnesses have been recorded on 16th October, 1992 and that the said statements have been verified by the Superintendent of Police, C-Division, Baroda city on 16th October, 1992. It has been pointed out by the learned AGP Mr.Y.M.Thakkar that the proposal in the case was made on 16th October,

1992 and the order of detention was passed on 17th October, 1992. It is rather curious that the entire bunch of material was supplied by the sponsoring authority at the time of making the proposal and that has been promptly accepted by the detaining authority and passed the order on the next day itself. At the time of exercising the privilege under Section 9[2] of PASA, a balance is required to be struck between the public interest on the hand and the right of the detenu to make a representation under Article 22[5] of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are fictitious persons or not and / or whether their statements are bogus statements or not ? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this, there is a provision under Section 9[2] carved out on the basis on Article 22[5] of the Constitution which provides that nothing in sub-sec [1] shall require the authority making such order to disclose facts which it considers to be against the public interest to disclose. Therefore, it is the duty of the detaining authority to strike a balance as stated above, that in the public interest, the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it affects the public interest on the one hand and the right of the detenu on the other. When that is so, the detaining authority is expected to do some exercise before actually exercising the privilege under Section 9[2] of PASA. Looking to the facts and circumstances of the case, it is clear, as stated hereinbefore, that the verified statements were also placed before the detaining authority and there was no sufficient time for the detaining authority to examine the possibility of exercising the power under Section 9[2], as the proposal was made on 16th October, 1992 and the order of detention was passed on the following day, i.e. 17th October, 1992, nor is there any material to show as to how

he examined the the necessity of exercising the power under Section 9[2]. Under the circumstances, in our view, it is a wrong exercise of power under Section 9[2] which has affected the detenu's right of making an effective representation under Article 22[5] of the Constitution of India and therefore, the continued detention of the detenu is bad and illegal and the impugned detention order is required to be quashed and set aside."

In case of CHANDRAKANT N. PATEL VS. STATE OF GUJARAT reported in 1994 [1] GLR 761, para-7.

"7. If we examine the decisions in the case of Bai Amina and in the case of Balakrishna closely, it becomes clear that what has been briefly stated as the correct legal position as regard the nature and extent of the privilege in the case of Balkrishna, has been more elaborately stated in the case of Bai Amina. The inconsistency appearing in the said two decisions is more superficial than real. In the case of Balkrishna, the right of the detenu has been described as a matter of private interest whereas in the case of Bai Amina , this Court has regarded that interest as "another public interest" and this according to the learned Additional Public Prosecutor, is the basic inconsistency in the said two decisions. In Balakrishna's case, the interest of the detenu has been described as a private interest while considering reasonableness of the restriction on the fundamental right of the citizen. The context in which the said right has been described as a matter of private interest becomes clear from the following observations made by the Court in that case :

"..... But as a privilege can only be claimed in public interest, the Constitution has placed interest above the private interest, even though the private interest may mean the liberty of the citizen."

Thus, the said observation came to be made by the Court in Balakrishna's case keeping the detenu in mind while the observation which has been made by this Court in Bai Amina's case is with reference to the nature and extent of the constitutional right of the detenu when he is detained by way of

preventive action. In a case where a person is detained by way of preventive action. In a case where a person is detained by way of preventive action, it is the liberty of an individual detenu which is involved and in that sense, it can be said that it is a matter of private interest and not public interest. But the right of the person so detained is recognised as a fundamental right by the Constitution and taking away of such right can only be in public interest. Adversely affecting liberty and such a right, therefor, can properly be regarded as a matter of public interest. We are, therefore, of the opinion that there is no inconsistency between the ratio of the division bench decision in the case of Balkrishna and the ratio of the decision of the division bench in the case of Bai Amina. We are also of the opinion that even otherwise also, it cannot be said that Bai Amina's case does not lay down good law. As stated above, the observations which have been made as to when and how the privilege can be claimed are made with a view to show what can be regarded as proper application of mind to all the relevant aspects; what can be regarded as proper application of mind to all the relevant aspects; what can be regarded as sufficient for purpose of claiming privilege; and when exercise of the privilege can be regarded as bona fide, whether that privilege has been exercised bona fide and properly or not obviously will have to be decided in each case by reference to the facts of that case. In the case of Balkrishna and also in the case of Bai Amina it has been so held. Considering the law relating to preventive detention, the nature of the right conferred on the detenue and the circumstances under which that right can be adversely affected, we do not think that what has been held in Bai Amina's case is not good law. Whether the detaining authority can be said to have applied its mind to all the relevant aspects properly or not would be a question of fact in each case and will have to be decided with reference to the facts of that case. Since the satisfaction in this behalf has to be of the detaining authority, obviously, the promise of confidentiality given by the person recording the statement cannot by itself be regarded as sufficient ground for withholding the disclosure of such particulars and materials. But if, after considering the general background, character, antecedent,

criminal tendency or propensity, etc., of the detenue and the reluctance of the witnesses who gave the statements against the detenue, the detaining authority is satisfied about the necessity of withholding some particulars or materials, then it cannot be said that the same was not done in public interest, and that public interest likely to be subserved by non-disclosure did not outweigh or override the public interest intended to be served by disclosure of the relevant particulars and materials to the detenue.

In case of Ranubhai B. Bharwad v. State, reported in 2000 [3] GLR pg.2696.

"After referring to Kalidas C. Kahar V. State of Gujarat, 1993 (2) GLR 1659 the Court observed :

The statements of the three witnesses in the instant case which were recorded before the Police Inspector on 17th August, 1999, 21st August, 1999 and 25th August, 1999 with regard to the incidents dated 10th July, 1999, 13th June, 1999 and 26th June, 1999 were the material along with the proposal which is said to have made on 27th August, 1999 and it is clear from the record that it was on 29th August, 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August, 1999 at any time prior to 29th August 1999 and on 29th August, 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e. on 30th August, 1999 the detention order has been passed. [para 9]

The manner in which the verification has been recorded of the statements made by these three witnesseth for the purpose of Section 9(2) shows that the same has been done only as an empty formality inasmuch as the same witnesses had been called before the statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an

active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesseth so as to express the fear and to invoke the privilege under Section 9(2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division bench that it is a case of wrong exercise of power under Section 9(2) and it is established that in such cases, the wrong exercise of power under Section 9(2) adversely affects the detenu's right of making an effective representation guaranteed under Article 22[5] of the Constitution of India. [para 9].

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority, it must have reasonable sufficient time for the purpose of verification of the fats and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege under Section 9(2) of the Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the present case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August, 1999, i.e. on the next day to the date on which the materials were considered by the detaining authority. [para 9]

#. The third contention which has been raised by the present petitioner that there was delay in passing the detention order from the last date of registered offence dated 8th October, 2000. The petitioner was released on bail on 10th October, 2000 and looking to two unregistered offence dated 24th November, 2000 and 2nd December, 2000, there was delay in passing the detention order. It is the duty of the detaning authority to pass the detention order immediately if activities of the petitioner are adversely affecting maintenance of public

order but since there was long intervening period or delay in passing the detention order against the present petitioner and when such delay has not been explained by the detaining authority in the reply, the subjective satisfaction arrived by the detaining authority does not stand justified and established. But according to the detaining authority looking to the two unregistered offence against the present petitioner, the order of detention has been rightly passed by the detaining authority. In light of this contention, view taken by this Court in reported decision in 1997 [1] GLH p.381 wherein the relevant observations are in para-21 are quoted as under :-

"21. In the instant case, the last registered case is of May 20, 1996. The petitioner detenu was granted anticipatory bail by the competent Court. He was also granted regular bail subsequently. The impugned order of detention has been passed on November 05, 1996, i.e. after a delay of 5 months and 15 days. It is of course true that the detaining authority has relied on two incidents of 2nd October and 10th October 1996, both unregistered cases. I have gone through the allegations. I fail to understand if the allegations are really of such a grievous nature, why the cases have not been registered against the petitioner. There appears to be some substance in the contention of the petitioner that these two unregistered cases have been referred only with a view to cover up the gap or to give life to a stale case. This unexplained delay makes a ground of detention not proximate, vitiating the order of detention itself. If I am to buttress my findings, I would say the reference may be made to the decision of the Supreme Court in Anand Prakash v. State of U.P. reported in AIR 1990 SC 516 and Pradeep Nilkanth v. S.Ramamurthy reported in 1993 [2] Suppli. SCC 61."

##. In view of above observations of this Court as well as Apex Court in respect of all three contentions, according to my opinion, looking to the facts of the present case, the order of detention requires to be quashed and set aside on the ground of non supply of documents which were relied and considered against the present petitioner while passing detention order, inspite of the demand and even there was delay which admittedly remained unexplained in passing the detention order from

the date of last registered offence and unregistered offence and privilege despite this, privilege claimed under Section 9[2] of the Act and without considering the background of the detenu, seriousness of the offence, past history of the detenu and other relevant factors, which have been considered by the full bench of this Court.

##. In the result, the present petition is allowed. The order of detention dated 31st December, 2000 passed by the Police Commissioner, Surat City is hereby quashed and set aside. The petitioner - detenu - KHAIRUNISSA SALIM MOHD QURESHI who has been detained at Sabarmati Central Jail is ordered to be set at liberty forthwith if he is not required in any other case. Rule is made absolute with no order as to costs.

Date : 24-7-2001 [H.K.Rathod, J.]

#kailash#